

Introduced by Senator Harman

February 12, 2010

An act to amend Section 4231 of, and to add Section 4231.5 to, the Probate Code, relating to powers of attorney.

LEGISLATIVE COUNSEL'S DIGEST

SB 1038, as introduced, Harman. Powers of attorney: duties.

Existing law requires an attorney-in-fact to observe the standard of care that would be observed by a prudent person dealing with property of another, or if an attorney-in-fact has special skills he or she shall observe the standard of care that would be observed by others with similar skills. However, existing law provides that an attorney-in-fact is not liable for a loss to the principal's property if he or she is not compensated, unless the loss results from his or her bad faith, intentional wrongdoing, or gross negligence.

This bill would delete this provision. The bill would provide that if the attorney-in-fact breaches a fiduciary duty he or she can be charged with interest for any loss or depreciation in value of the property, any profit made through the breach, or any profit that would have accrued to the principal if the loss or profit is a result of the breach. This bill would allow the court, in its discretion, to excuse the attorney-in-fact if he or she acted reasonably and in good faith, or if the attorney-in-fact acted in bad faith, he or she can be held liable for twice the value of the property recovered.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 4231 of the Probate Code is amended to read:

4231. (a) Except as provided in ~~subdivisions (b) and (c)~~ *subdivision (b)*, in dealing with property of the principal, an attorney-in-fact shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries.

~~(b) If an attorney-in-fact is not compensated, the attorney-in-fact is not liable for a loss to the principal's property unless the loss results from the attorney-in-fact's bad faith, intentional wrongdoing, or gross negligence.~~

~~(e)~~

(b) An attorney-in-fact who has special skills or expertise or was designated as an attorney-in-fact on the basis of representations of special skills or expertise shall observe the standard of care that would be observed by others with similar skills or expertise.

SEC. 2. Section 4231.5 is added to the Probate Code, to read:

4231.5. (a) If the attorney-in-fact breaches a fiduciary duty, the attorney-in-fact can be charged with any of the following, as appropriate under the circumstances:

(1) Any loss or depreciation in value of the principal's property resulting from the breach of duty, with interest.

(2) Any profit made by the attorney-in-fact through the breach of duty, with interest.

(3) Any profit that would have accrued to the principal if the loss of profit is the result of the breach of duty.

(b) If the attorney-in-fact has acted reasonably and in good faith under the circumstances as known to the attorney-in-fact, the court, in its discretion, may excuse the attorney-in-fact in whole or in part from liability under subdivision (a) if it would be equitable to do so.

(c) If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a principal under a power of attorney, the person shall be liable for twice the value of the property recovered by an action to recover the property or for surcharge. The remedy provided in this subdivision shall be

- 1 in addition to any other remedies available in law to the principal
- 2 or any successor in interest of the principal.

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